IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

THURSDAY, THE THIRTY FIRST DAY OF MARCH
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE SRI DEVINDER GUPTA,THE CHIEF JUSTICE

and

THE HON'BLE MR JUSTICE B.SESHASAYANA REDDY

WRIT APPEAL NO : 1721 of 2000

(Writ Appeal under Clause 15 of the Letters Patent against the Order dated 02/08/2000 in WP NO : 24089 OF 1998 on the file of the High Court.)

Between:

1 Government of A.P. rep.by the Commissioner and
Ex.Officio Secretary to Government I&CAD Department
Secretariat Buildings, Hyderabad
2 Chief Engineer (Projects) Neelam Sanjiva Reddy Sagar Project, 6th Floor, Gagan Vihar, Opp:Gandhi Bhavan
MJ Road, Hyderabad
3 Superintending Engineer SRBC, Circle NO.3
Nandyal, Kurnool Dist
4 Executive Engineer SRBC Division 3-4
Koilkuntla Kurnool Dist

..... APPELLANT(S)

AND

Sri Rama Engineering constructions (Engineers & Contractors)
Plot No.13, Kalyannagar, Hyderabad, rep.by its
Managing Partner, V.V.Raghava Chowdary

.....RESPONDENT

Counsel for the Appellants: GP FOR IRRIGATION & COMM AREA DEV.

Counsel for the Respondent : Mr M.R.K.Chowdary, Senior Advocate for MR.MUMMANENI.SRINIVASA RAO

The Court made the following order:

JUDGMENT: (per Hon'ble Sri Devinder Gupta, the Chief Justice)

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1. Learned single Judge by his order dated 2.8.2000 allowed the writ petition of the respondent-contractor, hereinafter referred to as the 'petitioner', thereby declaring the action of the first appellant in issuing the order in G.O.Ms.No. 118, Irrigation & CAD Department, dated 29.6.1998 and the consequential actions of the other appellants in giving effect to the impugned orders by way of making payment under final bill to the writ petitioner resulting in non-payment of Rupees 3.03 crores as illegal, arbitrary, discriminatory and unconstitutional and consequently directing the appellants to make payment of the withheld amount, including the recovered amount with interest from the date of passing of the impugned order.

2. The appeal questioning the said order of the learned single Judge is filed by the State Government, inter alia, on the ground that the learned single Judge ought not to have entertained money claim of the writ petitioner in respect of a commercial transaction arising out of a non-statutory concluded contract in exercise of jurisdiction under Article 226 of the Constitution of India, more particularly in view of highly contentious and disputed questions of fact arising for consideration.

3. Facts in brief are that the petitioner was awarded work of excavation of Srisailam Right Branch Canal from 116 KMs to 141 KMs including

construction of structures and lining under Package XIII. The agreement was entered into between the petitioner and the respondents on 8.5.1991 at a cost of Rs.23.57 crores. Work was commenced on 2.7.1991. It was to be completed by June 1994, but the period was extended up to 30.6.1995. Again three months extension was granted up to 30.9.1995. Extension became necessary owing to change in scope of the work and addition of new items of work of the project resulting in increase of the amount of contract. Different items of works were included in the tender estimates with reference to the requirements indicated in the bidding documents. It also indicated quantities of various items of excavation of soil work, etc. Amongst other items the quantity of F & F rock was estimated as 119 Cubic Metre both in the tender estimates and the bidding documents. After commencement of the work, it was noticed that the quantity of F & F rock was many times more than indicated in the estimates and the bidding documents. Variation was in unreasonable proportion and was on very high side. This also led to the re-classification of the strata during the course when canal was exposed. The actual execution of F & F Rock thus came to 6,94,824 Cubic Metre., as against 119 Cubic Metre. The rate for F & F rock in the agreement was mentioned at Rs. 126/- per Cubic Metre.

4. Petitioner's case is that award of the contract does not depend upon particular individual rate of any individual item accepted. The rates indicated as bid prices do have an integral effect in evaluating the work of the contract and the amount was arrived basing on the estimated bill of quantities and agreed prices with reference to quantities. Once the contract is concluded, the rates on each items of work specified cannot be altered by any of the parties either without notice or with notice except by way of breach of contract. After commencement of the work there was actual execution contrary to the factual estimates on higher side, for which under the contract the rate quoted was accepted, i.e., Rs. 126/- per Cubic Metre. The respondents were bound to pay the agreed amount. Due to increase in the quantity thereby unexpected quantities, which resulted in increase in the quantity thereby enlarging the budget for the work, in

order to meet the requirement of payment, in spite of increase in expenditure, the department started devising ways and means to reduce the burden by indirectly inducing themselves to reduce the rate for which they were not entitled. The petitioner, thus, resisted any reduction or variation in the rate of excavation of F & F rock in the entire canal area. Resultantly, the respondents appointed a Committee for which G.O.Ms.No. 134 dated 16.9.1998 was issued. It was amended by G.O.Rt.No.708 dated 19.5.1995. The Government decided to have the views of the Chief Technical Examiner and Deputy Financial Adviser also. They were included as Members. Thus, experts went into various details of the case and were asked to make suitable recommendations. The Committee made its recommendations and submitted the same to the Government on 31.12.1995. As regards F & F rock in addition to twelve items the Committee opined that agreed rate has to be paid in respect of actual quantity executed. Despite recommendations of the expert committee and despite the fact that the entire work was carried out by the petitioner, the amount was not paid to the petitioner. The Government did not disclose its mind and did not come to any conclusion, but ultimately passed the impugned order in G.O.Ms.No. 118, Irrigation & Command Area Development, Department unilaterally ignoring the report of the expert committee and directing payment to be made at the rate of Rs. 90/- per Cubic Metre instead of Rs. 126/- per Cubic Metre, which resulted in heavy loss to the petitioner to the tune of Rs. 3.03 crores.

5. The petitioner's case is that on receipt of impugned orders, final bill was prepared by Appellants 3 and 4 giving effect to the orders of the Government resulting in recovery of amount to the extent that had already been paid to the petitioner and in refusing to include the amount, which was due and payable under the terms of contract in terms of the final bill. The total amount payable to the petitioner was thus refused to be paid to the tune of Rs. 3.03 crores by virtue of the impugned orders passed by the Government and thus the petitioner questioned the said order of the Government being arbitrary, illegal, and discriminatory and sought the direction prayed for.

6. The writ petition was resisted by the respondents/appellants herein. Preliminary objection was raised as regard maintainability of the writ petition alleging that the relief prayed for in the writ petition relates to fixation of rates for certain works done by the petitioner in respect of the contract awarded and the petitioner is seeking direction for payment of amounts which according to the petitioner were agreed to be paid. Thus the issue in the writ petition involves determination of quantum of the amount to which the petitioners claims entitled. The parties are governed by contract dated 8.5.1991. The relief sought for in the writ petitioner is nothing but enforcement of contractual rights. The petitioner is not entitled to invoke the jurisdiction under Article 226 of the Constitution. As per clause 56.2 (2) of the General Conditions of Agreement, all claims above Rs. 50,000/- are to be settled by a Court of Competent jurisdiction by way of civil suit and claims below Rs. 50,000/- have to be got resolved by arbitration.

7. On merits the appellants alleged that the work of earth excavation, lining and construction of structures on SRBC from 116.00 to 141.00 was awarded to M/s. Sri Rama Engineering Constructions, Hyderabad by the Superintending/Engineer, SRBC, Circle No. 3, Nandyal under Agreement No. 11CB'91-92 dated 8.5.1991 for Rs. 23, 57, 28, 597/- with 45.01% excess over the estimated value. The work was scheduled to be completed by 1.7.1994. Later on extension of time to complete the works was granted up to 30.9.1995. In view of the variation in classification of soils during execution of work the Superintending Engineer, SRBC, Circle No. III Nandyal and Superintending Engineer D & I Circle Srisailam Project jointly inspected the open reclassification on 24.1.1992. The quantity of F & F rock was found to have increased considerably during actual execution of work. As against the estimated quantity of F & F rock of 119 Cubic Metre, the actual quantity during execution was found to be 6,94,824 Cubic Metre. The respondents thereafter referred to Clause 32 (1) of the Conditions of Agreement according to which the contractor is bound to execute the quantities over and above the quantities set out in the bill of quantities and no variation while executing the work either in the

quantities or other, vitiate or invalidate the contract but the value if any of such variation shall be taken into account while ascertaining the amount of the contract price. It was stated that the extra work done was proportionately on higher side as compared to the estimated quantities, therefore, as per Clause 32 (3) and (b) of Volume I of the General and Special Conditions of Contract, in the event of disagreement, the appellant was entitled to fix rates which in its opinion would be reasonable and appropriate. Appellants while quoting Clause 32 (3) of the General and Special Conditions of Contract justified its action saying that during actual execution of work, highly excessive variations in classification of soils and quantity of F & F rocks were noticed. As against the estimated quantity of F & F rock of 119 Cubic Metre it was found to be 6,94,824 Cubic Metre. Similarly, hard rock was not estimated at all and was not included in agreement but in actual execution the hard rock excavated was found to be 6,19,277 Cubic Metre. “Nandyal Shales” was estimated as 13,91,672 Cubic Metre. During execution and inspection the said classification was not at all found. In these circumstances the deviation in quantity in so far as F & F rock being on quite higher side, it was considered unreasonable to apply the rate of Rs. 126/- per Cubic Metre, keeping in view the meagre estimated quantity of 119 Cubic Metre. Moreover the contract did not contain any rate for additional work. In the opinion of the competent authority adoption of rate of Rs. 126/- per Cubic Metre for the F & F rock over the quantities mentioned in the agreement was unreasonable, the contractor was offered the rate of Rs. 90/- per Cubic Metre as per Clause 32.3 (3) (b) of the Agreement, keeping in view the nature of work and site conditions based on day work field data. The respondent disagreed for the said rate of Rs. 90/- per Cubic Metre and insisted for payment at Rs. 126/- per cubic metre. In the meeting held on 11.6.1993, discussions took place between the Superintending Engineer and the Executive Engineer on one hand and the Managing Partner of the petitioner/firm on the other. Minutes were recorded which read:

"F & F rock. This is a new item not covered in the schedule. The Contractor has not agreed for the rate of Rs.90/- offered for this item. Hence the rate of Rs. 90/- (Ninety rupees only) is fixed for payment of this item under this schedule."

8. Thus, the third respondent acting for and on behalf of the Governor of Andhra Pradesh being the employer negotiated with the petitioner for fixing suitable rate. The petitioner disagreed and ultimately the third respondent fixed Rs. 90/- per Cubic Metre, which in his opinion was reasonable and proper in the circumstances. Accordingly, the third respondent reported the matter to the Government for permission to fix the said rate. The Government accepted the rate at Rs.90/- per Cubic Metre and issued order in G.O.Ms.No. 118 dated 29.6.1998 permitting fixation of Rs.90/- per Cubic Metre for the entire extra work done. The respondents-appellants claimed that Clause 32 confers absolute power on the employer to fix rate or price, which in his opinion is reasonable and proper. The rate so fixed by the third respondent in the meeting held on 11.6.1993 having been approved by the Government was thus final and binding. As regards constitution of Committee and its recommendations, the respondents' reply was that the opinion rendered by the Committee, being recommendatory in nature, was not binding and thus was ignored.

9. Narration of the facts aforementioned would show that the writ petitioner claimed to be entitled and to be paid, even for the extra work of the quantity of F & F rock, executed which was abnormally in excess of the estimated quantities of 119 Cubic Metre at the rate of Rs. 126/- per Cubic Metre, being the agreed rate further saying that the respondents have got no authority and jurisdiction to fix any other rate. The case of the respondents is that this extraordinary and disproportionate excess work from the estimated quantity is not governed by the rate agreed. Clause 32 would be applicable and employer is entitled to fix its own rate. There were negotiations between the parties and various discussions took place. During actual execution of work huge variations in classification of soils' and quantity of rocks were noticed. There being disproportionate deviations, the employer was justified in fixing the rate, which according

to him was reasonable. As there was dispute amongst the parties and in case the petitioner had to question the legality and validity of the said order, it has to prove its case in a court of law. It is not a case in which only interpretation of a clause in the agreement is involved. Highly disputed questions of law and fact are involved, e.g., What were the circumstances which led to the increase in the extraordinary quantity of work executed? Whether or not the agreement provided for the same rates even for the excessive quantity of work, if not, what would be the reasonable amount in the facts and circumstances – in case the rate fixed by the respondents is not found to be reasonable and whether the petitioner is entitled to contractual rate or any other rate. Thus, the dispute between the parties is not on questions of law alone or on, interpretation of terms of agreement but also on facts, as to their respective rights vis-à-vis terms of contract. The respondents, thus, alleged that in these circumstances, it was not appropriate to entertain such a claim in exercise of jurisdiction under Article 226 of the Constitution and issue the direction as prayed for payment of the amount. It would have been appropriate to relegate the petitioner to ordinary remedy of filing civil suit.

10. Learned single Judge rejected the objections of the respondents and held that it was permissible to the court to entertain writ petition in such like matters and thus proceeded to hold the impugned order of the respondents to be illegal, arbitrary and without jurisdiction and allowed the writ as prayed for i.e., directing payment of the amount.

11. Before us learned Advocate General appearing for the appellants urged that choosing the remedy of filing writ petition was not appropriate one. Writ petition ought to have been dismissed relegating the petitioner to avail the remedy of civil suit. There were highly disputed questions of law and fact arising for determination. Learned Advocate General contended that the learned single Judge lost sight of the fact that the excess amount of Rs. 1,81,38,382/- paid to the respondent during the period 26.1.1992 to 14.7.1993 at the rate of Rs. 126/- per Cubic Metre stood already recovered from the respondent against the last part-bill dated 7.8.1998.

The final bill payable to the writ petitioner was under process and would have been paid in usual course. It was further contended that the rate of Rs. 90/- per cubic metre was offered to the respondent for F & F rock, keeping in view the nature of work and site conditions based on day work field data as well as the price paid to the contractors in the adjacent similarly situated reaches. It was also contended that having received the benefit of fixation of rates for the hard rock by the employer, in terms of Clause 32 (3) of the Agreement, it was not open to the writ petitioner to approbate and reprobate and to question the action of the employer in fixing the rate for F & F rock by exercising the very same power under Clause 32 (3) of the agreement. Lastly, it was contended that fixation of rate at Rs. 126/- per Cubic Metre by the Committee was arbitrary and highly excessive and without any basis. The department had already initiated disciplinary proceedings against the officers who had proposed such an excessive rate.

12. Learned counsel for the writ petitioner submitted that it is not an universal rule that filing of writ petition under Article 226 of the Constitution of India is not the appropriate remedy in such like cases. It depends upon the facts and circumstances of each case. Writ petition under Article 226 can be entertained even in such cases where the relief prayed for is monetary claim and even where disputed questions of fact are raised. Relegating the writ petitioner to ordinary remedy of civil court would cause immense prejudice to the writ petitioner inasmuch as the basic facts in this case are not at all in dispute. The case can be decided without any further evidence on the basis of the material placed before the Court. The question involved is only about interpretation of a clause of the agreement. Therefore, the learned single Judge was perfectly justified in having set aside illegal and arbitrary order of the Government and consequently in allowing the writ petition.

13. Learned counsel for the parties referred to numerous decisions of the Apex Court including those which are referred to in the judgment of learned single Judge. All of them need not be dealt with by us inasmuch as the principles of law are now well settled and we would refer only to the

decisions, which fully cover the submissions made on behalf of the parties.

14. Learned single Judge took note of various decisions cited and relied upon by the parties before him on the two points, which according to the learned single Judge arose for consideration:- (i) Whether the writ petition is maintainable for enforcement of the contractual obligation arising under the agreement dated 8.5.1991; and (ii) Whether writ can be issued in contractual matters if the opinion of the State were found to be arbitrary offending Article 14 of the Constitution of India. Third point was also examined by the learned single Judge "whether G.O.Ms.No. 118 dated 29.6.1998 was valid and competent".

15. Learned single Judge on review of various judgments concluded that the action of the State or the instrumentalities of the Act even in contractual sphere is also amenable to judicial review under writ jurisdiction, but with certain limitations. If it is found that the State has acted arbitrarily and in violation of Article 14 of the Constitution even in non-statutory contracts also the said action is liable to be declared as unconstitutional and the State cannot plead immunity from Article 14 of all its actions. Arbitrariness may creep, at any stage, even in contractual matters, such as the stage of tender qualification, during the process of finalization of tenders, subsequent to entering into contracts, during the currency of contracts and even after the period of contract. Thus, there is no definite yardstick of interference by courts under Article 226 of Constitution of India. Learned single Judge referred to the decisions reported in **E.R. Royappa v. State of Tamil Nadu, Radha Krishna Agarwal v. State of Bihar, Maneka Gandhi v. Union of India, R.D. Shetty v. International Airport Authority of India, R.D. Shetty v. International Airport Authority, Kasturi Lal Lakshmi Reddy v. State of J & K, Som Prakash Rekhi v. Union of India, Fertilizer Corporation Kamgar Union v. Union of India, Ajay Hasia v. Khalid Mujib Sehravardi, Chief Constable of the North Wales Police v. Evans, Asst. Collector, Central Excise v. Dunlop India Ltd., LIC of India v. Escorts Ltd., Dwarkadas Marfatia v.**

Board of Trustees of the Port of Bombay, Fasih Chaudhary v. Director General, Doordarshan, Mahabir Auto Stores v. Indian Oil Corporation, Shrilekha Vidyarthi v. State of U.P., R v. Secretary of State for the Home Deptt. Ex. Brind, Assistant Excise Commissioner v. Issac Peter, Tata Cellular v. Union of India, Union of India v. M/s. Graphic Industries Co., State of U.P. v. Bridge Roof & Co., Ramniklal N. Bhutta v. State of Maharashtra, Asia Foundations and Constructions Ltd. v. Tratalyar House Constructions, State of M.P. v. M.V. Vyavsaya & Co., Raunaq International Ltd. v. IVR Construction Ltd., State of H.P. v. Raja Mahendra Pral, Air India Ltd. v. Cochin International Airport Ltd..

16. Relying on the principles as culled out by the learned single Judge from the decisions aforementioned, he referred to Clause 32 of the Contract entered between the parties and then referred to the minutes of the meeting as recorded in the recommendations which made to the Government by the Committee appointed for the purpose that the rate for F & F rock item 1 (d) the agreement rate has to be paid irrespective of the actual quantity met with in terms of the agreement condition, which in fact had not been approved by the Government. Learned single Judge observed that the very approach of the Superintending Engineer was misconceived when he proceeded to classify this item as a new item in the minutes of the meeting with the contractor. Without deciding the question as to whether it was a new item as was the stand taken by the Superintending Engineer or the item referred to in the agreement, learned single Judge proceeded on the basis that as the matter had been referred by the Government to the Committee and the Committee had affirmed that the writ petitioner is entitled to be paid at Rs. 126 per Cubic Metre by giving a go-bye to the high power committee, the very act of the Government in fixing the rate at Rs. 90/- was arbitrary and illegal. Learned single Judge also proceeded to observe that fixation of Rs. 90/- per Cubic Metre was not an issue in the writ petition and it was not required to be considered whether fixation of Rs. 90/- per Cubic Metre was or was not justified. The issue was whether the action of the Government in not

paying at Rs. 126/- per Cubic Metre to the writ petitioner was arbitrary or not. Thus, the process adopted by the Government in reducing the amount from Rs. 126/- to Rs. 90/- per Cubic Metre, according to the learned single Judge, had to be tested on the touchstone of Article 14 of the Constitution. The approach of the Government was termed as highly unreasonable, unjust and unfair and also contrary to public interest and held that if the approach of the Government is found to be contrary to terms of contract, it would be unreasonable and unfair action on the part of the Government and the court would certainly interdict the action of the Government. Learned single Judge also observed that when the terms of the contract provide for a particular mode or process to be adopted and in case the Government adopts a different mode, it has to be declared as arbitrary and unconstitutional. The learned Judge also held that the first proviso to Clause 32 (3) is clear that in case of increase or decrease of additional work, the same rate was permissible. Extra F & F rock was noticed immediately after commencement of excavation in 1991 and the extra rock was excavated up to 1993. Only after completion of about 72% of work objection was raised and the Superintending Engineer tried to meddle with the contract by invoking the alleged power under Clause 32, which could not be done after so much work had been executed. Immediately after commencement of the work it was known that extra F & F rock excavation was much beyond estimated quantity. In addition to these findings, learned single Judge also termed the action of the Government in reducing the amount from Rs. 126/- per Cubic Metre to Rs. 90/- per Cubic Metre as mala fide. According to learned single Judge, the Superintending Engineer noticed that in case the extra item is paid at Rs. 126/- per Cubic Metre, it would involve heavy amounts, therefore revision of rate was necessary thus giving a go-bye to the recommendations of the Committee. The Superintending Engineer suggested to pay Rs. 90/- and the Government agreed with the same. This action was termed as highly mala fide. Instead of quashing the said decision and leaving it open to the Government for taking decision afresh, learned single Judge allowed the writ petition as prayed for, which as noticed above, amounts to directing

the State Government to make payment to the writ petitioner of the amount claimed by him at a particular rate.

17. Learned counsel for the parties besides reiterating the same arguments, which were addressed before the learned single Judge, and referring to the decisions relied upon by him in the judgment also placed reliance on a recent decision of the Supreme Court in **ABL International Ltd., v. Export Credit Guarantee Corpn. of India Ltd.** This being an authoritative pronouncement, learned counsel for the writ petitioner urged that the appeal is liable to be dismissed, whereas learned Advocate General also placing reliance on the very said decision submitted that it is not such a case in which writ petition ought to have been entertained since the writ petition involves highly disputed questions, both of facts and of law on which evidence will have to be led.

18. Learned single Judge of Calcutta High Court in **ABL International Ltd.,** had allowed the writ petition but in appeal the appellate Bench of the High Court dismissed the writ petition on the ground that the writ petition involved disputed questions of fact which could not be adjudicated in writ proceedings and thus set aside the judgment of the learned single Judge. The Supreme Court allowed the appeal with costs and held that the writ petition involving serious disputed questions of fact, which requires consideration of evidence which is not on record, will not normally be entertained by a court in exercise of its jurisdiction under Article 226 of the Constitution, but there is no absolute rule that in all cases involving disputed questions of fact, the parties be relegated to the remedy of civil suit. Relying on an earlier decision in **Gunwant Kaur v. Municipal Committee, Bhatinda** it was held that in an appropriate case, writ court has also jurisdiction to entertain writ petition involving disputed questions of fact if the circumstances so require and even oral evidence can be taken. There is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact. Reliance also placed on the decision in **Century Spg.**

and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council. The Judges clarified the ratio of the decision in **State of Bihar v. Jain Plastics and Chemicals Ltd.** Referring to the facts of the case before it, the Supreme Court in **ABL International Ltd.,** held that merely because the first respondent wants to dispute the meaning of a clause of the insurance contract it does not become a disputed fact. However, if such an objection as to disputed questions or interpretations is raised in a writ petition, if facts permit the same the courts can very well go into the same and decide that objection. It was held that the only fact that was disputed was the application of the first respondent to cover the risk of non-payment of consideration by cash in U.S. currency on the ground that the risk covered by the first respondent is a risk arising out of non-supply of goods by the barter method only. This limited area of dispute, according to Hon'ble Judges of the Supreme Court, was capable of settlement by merely looking into the terms of contract of the insurance as well as the export contract not requiring any consideration of oral evidence or any other documentary evidence other than what was available on record. They further observed that the claim of the contesting parties will stand or fail only on the terms of the contract, interpretation of which does not require any external aid. Thus, the Supreme Court interpreted the clause and proceeded to allow the appeal and set aside the judgment of the Division Bench of the High Court and allowed the writ petition.

19. We need not refer to the ratio of the other decisions of the Supreme Court individually more especially when in **ABL International Ltd.,** almost the settled principles have been reiterated.

20. The settled position in law as regards writ petitions under Article 226 of the Constitution is that Article 226 is couched in the widest possible terms and confers on all High Courts very wide powers in the matter of issuing various writs or orders subject to only two limitations, namely, (i) power is to be exercised throughout the territories in relation to which it exercises jurisdiction and that (ii) the person or authority to whom the High Court is empowered to issue writs must be within those territories. Unless there is

a clear bar to this jurisdiction, the powers under this Article is unlimited and can be exercised by the High Courts. Though the powers of the High Courts are discretionary and no limits can be placed upon that discretion, but the said power must be exercised along recognized lines and not arbitrarily. There are certain self-imposed limitations such as (a) in exercise of this jurisdiction the High Court should not act as Court of appeal or revision to correct mere errors of law or fact because this jurisdiction is supervisory in nature and (b) resort to the jurisdiction under Article 226 is not intended as an alternative remedy for relief which may be obtained by invoking the jurisdiction of Civil Courts by filing suit or by other modes prescribed by the statute. Where it is open to the aggrieved person to move another Tribunal or even itself in another jurisdiction for obtaining redress in the manner provided in the statute, the High Court will not by entertaining a writ petition under Article 226, permit the machinery created by the statute to be bypassed. Normally, High Court does not enter upon determination of questions which demand an elaborate examination of evidence to establish the right, the enforcement of which writ is claimed. There is also no absolute bar of entertaining writ petition even when disputed questions of law or facts are involved. In a given facts and circumstances, Court is not debarred even to take oral evidence and adjudicate the disputed questions of fact and when case involves interpretation of a clause or agreement, even in contractual matters, the Court can go into the question of interpreting the clause or contract. But, in such a case, there should be enough material on record so as to enable the Court to interpret that clause. In a case involving serious disputed questions of fact, which require consideration of evidence, which is not on record, normally a petition will not be entertained by a court in exercise of its writ jurisdiction under Article 226 of the Constitution. There is, however, no absolute rule that in all such cases, involving disputed questions of fact, parties be relegated to the ordinary remedy of civil suit. If the circumstances of the case so require, oral evidence can also be recorded in an appropriate case. But normally the parties will be relegated to the ordinary remedy of civil suit when highly disputed questions of fact

would arise requiring oral evidence which is not on record. The exercise of jurisdiction thus depends upon facts and circumstances of each case, the nature of the dispute or difference, the quantum of evidence to be recorded, etc.

21. Learned single Judge, in the instant case, proceeded on the assumption as if the only question to be considered was of the action of the Government in not paying the agreed rate of Rs. 126/- per Cubic Metre for the entire extra quantity of F & F rock, which according to the writ petitioner is an arbitrary action. He further proceeded on the assumption that when the Government itself appointed a Committee of experts, it was bound by the opinion of the Committee and ought to have made payment to the writ petitioners. The very action of the Government to ignore the recommendation of the Committee and approving the rate of Rs. 90/- per Cubic Metre, was arbitrary, unconstitutional and mala fide. Learned single Judge did not consider the question as to whether the State Government was justified in taking its own decision based upon the recommendation of the Superintending Engineer in a case where disproportionately excessive work was executed beyond the estimated one. The extra work executed was almost 5839 times more than the estimated one. For such excessive work whether the rate to be paid would be which in the opinion of the employer was just and reasonable and in that eventuality he also lost sight of the fact that highly disputed questions of fact and law were involved on this aspect and it was not a case of only interpretation of Clause 32 of the agreement but a case in which the parties were in dispute even on facts, which is evidenced from bare reading of the pleadings of the parties and also from the contents of the report of the Committee.

22. On having gone through the affidavits exchanged between the parties and the documents filed on record, it becomes abundantly clear that it was not a case of mere interpretation of Clause 32 (3) of the agreement, which reads as under:

"32 (3) <u>VALUATION OF VARIATION:</u>

a. All extra or additional work done or work omitted by order of the employer, shall be valued at the rates and prices set out in the contract., if the opinion of the employer, the same shall be applicable. If the contract does not contain any rates or prices, applicable to the extra or additional work, then suitable rates or prices shall be agreed upon between the employer and contractor. In the event of disagreement the employer shall fix such rates or prices and the foreign currency requirement thereof as shall in the opinion, be reasonable and proper;

b. Provided that if the nature or amount of any omission or addition relative to the nature or amount of the whole of the works or to any part thereof shall be such that, in the opinion of the employer, the rate or price contained in the contract for any item of the works is by reason of such omission or addition, rendered unreasonable or inapplicable, then a suitable rate or price shall be agreed up between the employer and the contractor. In the event of disagreement the employer shall fix such other rate or price and the foreign currency requirement thereof as shall, in his opinion, be reasonable and proper having regard to the circumstances. Provided that no change in the unit rates or prices quoted shall be considered for items included in the schedule of day work rates not withstanding the quantity of work performed under such schedule, nor for any item in the other schedules to the bill of quantities, unless such item individually accounts for an amount of more than 2 per cent of the contract price named in the letter of acceptance, and the actual quantity of work performed under the item exceeds or fall short of the original billed quantity by more than 25 percent."

23. The parties were also not at all in full agreement on facts. Only on one point there was no dispute that the estimated quantity of F & F rock was recorded as 119 Cubic Metre, but in actual execution the quantity of F & F rock was found to be 6,15,529 Cubic Metre. Thus the excess quantity was 5838.85 times more than the estimated one. It may also be noticed here that the total work was awarded for Rs. 23,57,28,597/-. It was 45.01% in excess of the estimated value. The quantity of 119 Cubic Metres of F & F rock was valued by the contractor in his quotation at the rate of Rs. 126/- per Cubic Metre i.e., Rs. 14,994/-. Thus, the percentage of the value of F & F rock in the total value of the work was 0.006%. On re-classification quantity of F & F rock increased 5838.85 times more. In the opinion of the

Committee also re-classification was not done properly. One of the Superintending Engineers, who ought to have been associated at the time of re-classification, viz., the Superintending Engineer D & I Circle in-charge of quality control was not so associated. Non-association of the Superintending Engineer of D & I Circle was contrary to the then practice in vogue. The Chief Engineer (Projects), Srisailam had thus flouted the established practice and assigned the task of re-classification only to the two Superintending Engineers in-charge of the construction circle. The Committee had also opined that when established practice was not followed, it would have been but proper for the Chief Engineer (Projects) to inspect the site and satisfied about the correct classification. It was also not done. Even the experts constituting the Committee were not in a position to verify on the spot about the correctness or otherwise of the classification and quantities involved. On re-classification, Nandyal Shales were found to be not in existence, whereas quantity of F & F rock exceeded 5838.85 times more than the estimated quantity. Whereas value of F & F rock in the tender was 0.006% of the entire value of contract but on re-classification the value of F & F rock increased to 37.13% of the total value. As against total value of Rs. 14,995/- of F & F Rock, on re-classification the value increased to Rs. 8,75,32,830/-.

24. The estimated quantity of Nandyal shales was mentioned as 13,91,672 Cubic Metre. The said classification was not found during execution of the work. The expert Committee was of the view that at the time of preparing estimates, classification appears to have been done erroneously and thus opined that the rock at site was misconstrued as Nandyal shales. Nandyal shales classification was noticed only in the head reaches of SRMC & SRBC and not in the tail end reaches of SRMC & SRBC. The Committee opined that the item classified as Nandyal Shales was not in existence though it was provided for in the estimates. The Committee also noticed that the contractor right from 1991 had been requesting the department to give him correct classification, but the department appears to have made in the estimates wrong classification as Nandyal Shales whereas similar type of rock was classified as F & F in the adjoining reaches by the

department. The contractor was found to have lodged his protest while payments were made to him. As per the report of the Committee, Nandyal Shales were non-existent resulting in abnormal increase in F & F rock. Based upon the representation of the contractor, the Chief Engineer (Projects), Srisailam issued instructions for joint inspection to be done. Two Superintending Engineers jointly inspected the reaches and classified the Nandyal Shales as F & F rock. The Committee found fault with the entrustment of this work to the two Superintending Engineers alone. The Committee also opined that the joint classification had revealed that it was only F & F rock that met with the packages and not the Nandyal Shales. Though there was dispute whether it was Nandyal Shales or F & F rock, but the Chief Engineer (Projects) seems to have agreed to re-classify it as F & F rock without himself verifying it. Report was sent to the Government that it was a new item. The Committee was also unable to verify for itself about correctness of the classification whether it was F & F rock or it was Nandyal Shales when deviation noticed was considerable.

25. Thus, even the Committee was not definite as to whether it was F & F rock or it was Nandyal Shales. The Chief Engineer (Projects) had agreed for re-classification and accordingly had sent report to the Government recommending payment at Rs. 90/- per Cubic Metre and in his report had assigned valid reasons. The writ petitioner was also provided by the department with the data and analysis that how and in what manner rate of Rs. 90/- had been worked out by the Department. In these circumstances whether such an item had to be treated as a new item or an old item was a highly disputed question of fact arising for determination. According to the appellants this dispute between the parties required evidence to be led on record. The writ petitioner had disputed the data and analysis supplied by the department when the Department agreed to provide Rs. 90/- per Cubic Metre saying that the department had not taken into account various components of direct and indirect costs, such as transportation of machinery from carriage to site and from site to carriage, etc. The writ petitioner in his turn provided to the Department his cost analysis. This

analysis and data admittedly was not included in the estimates or in the contract. The contractor thus wanted his bills to be approved on the rates as quoted by him. Thereafter, there was no meeting of mind, which led to appointment of the Committee and the report of the Committee submitted to the Government, which gave its own reasons that why the contractor should be paid for F & F rock at the rate of Rs. 126/- per Cubic Metre. The Committee had also noticed that the tender had not been evaluated item-wise or on the basis of the individual rates for each item and had suggested ways and means that in future how to evaluate tenders better. The Committee in its report said:

> "In the present system of evaluation, individual rates for such item are not compared. The overall rates quoted are only compared to decide the lowest bidder. In the process contractors can got away with differential rates for similar work. In this case for instance, the Contractor has quoted for "all soils" in Cat A (Earth Work) at Rs. 27/- Cubic metres, whereas for all soils in Cat C (structures) the rate quoted is Rs. 36/- irrespective of depth of excavation."

26. From the above, it will be clear that while finalizing tenders individual rates for each item were not compared. Only the overall rates quoted were compared to decide the lowest bidder. The Committee was also of the view that in this manner in such like cases by not evaluating and comparing individual rates for each item, a contractor would get away with the differential rates for the similar work, which exactly had happened in this case. While making its recommendations the Committee did not consider that what were the rates quoted by the petitioner for the item shown in the contract as Nandyal Shales, which were estimated to the extent of 13,91,672 Cubic Metre. The same were not at all in existence. Obviously the rates quoted for Nandyal Shales were included by the writ petitioner in the total value quoted. The Committee, while commenting upon as to how the tender should be evaluated in future, quoted an instance from the present tenders that the writ petitioner had quoted for "all soils" in Category-A at Rs. 27/- per Cubic Metre and whereas for all soils in Category-C the rate quoted was Rs. 36/- per Cubic Metre

irrespective of depth of excavation. Thus, there was discrepancy in the rates quoted for similar categories of soils without mentioning the depth of excavation. Already we have noticed that the value of F & F rock that on actual execution was found to be 37.13% of the total value of the work, whereas in the contract this value was only 0.006% of the total value of the work. Increase was by 5838.85 times more than the estimates. In such circumstances it was but necessary for the Committee to have atleast mentioned about the rate of Nandyal Shales quoted by the petitioner and the total value of the Nandyal Shales as per the estimates. The Committee ought to have found out the percentage of difference between the actual value of F & F rocks with the actual value of the Nandyal Shales, which were not in existence. One item was not found in existence and the other was found in existence. The Committee did not bother to go into these aspects.

27. It has been the case of the writ petitioner that at the commencement of the work the classification of the strata met with at the site differed completely with that provided for or notified in the tender and that the contractor had repeatedly been writing to the Department time and again to re-classify the strata as per the actual situation at the site. But neither re-fixation nor reclassification was done. As per Clause 32 (3) it had to be done only on mutual agreement and in the event of disagreement by the employer it had to provide for as a new item. Whether or not it had to be done as a new item or whether it was not a new item is another serious matter of dispute between the parties, which can only be decided by leading appropriate evidence.

28. As noticed above, learned single Judge proceeded on the assumption that whether Rs. 90/- per Cubic Metre had or had not correctly been fixed or whether the contractor had to be paid only at Rs. 90/- per Cubic Metre or not was not an issue before him. He presumed that it was also not an issue before him that in case Rs. 126/- per Cubic Metre is not to be paid, then what rate ought to be paid to the contractor. This erroneous approach on the part of learned single Judge misdirected him and led to incorrect

conclusion. The case of the writ petitioner through out has been that when he has executed a particular type of work as per contract, he must be paid same rate as provided for in the contract and no other rate, even if the item of work has exceeded several times the estimated quantity. According to the appellant the nature of the additional work and not existence of another major item of the work were such which in the opinion of the Superintending Engineer had rendered the rate in the contract for F & F rock by reason of excessive addition and non-existence of Nandyal Shales unreasonable or inapplicable thereby necessitating rate to be mutually agreed upon. In the meeting with the Superintending Engineer, as also the term of reference and as also in the final order passed, this item of excess work was taken as a new item for which reasonable rate was approved at Rs. 90/- per Cubic Metre by the Government. In such an eventuality in case the writ petitioner was not agreeable to accept the said rate, the only course open for him would be to raise a dispute and challenge the action of the Government and claim decree for the actual item of work carried out by him. What would be the actual rate or actual amount payable to him would have to be decided on leading evidence. It is not a case of mere interpretation of a clause in the agreement or finding fault with the order of the Government.

29. Learned single Judge proceeded to assume that the Government was bound to accept the opinion of the expert contained in the report of the Committee. The report of the Committee being merely an opinion of experts, was not binding on the Government. It was open for the Government to have accepted or rejected the same without assigning any reasons for either accepting or rejecting such a report. The employer had already taken a decision in terms of the contract, which in our opinion is fully applicable. Clause 32 (3) (b) says that unless the item of work individually accounts for an amount of more than 2% in the letter of acceptance and the actual quantity of work performed fall short of original bid quantity by 25%, same rate as quoted shall be considered for the

extra quantity performed. In the instant case, work performed for F & F rock exceeded more than 25% of the original quantity and such item individually accounts for an amount less than 2% of the contract price. The item of F & F rock accounted for less than 2% i.e., 0.006% of the amount of total work but deviation was more than 25% i.e., 37.13%. The petitioner, thus, was rightly not entitled to the agreed rate, but is entitled to such rate as might be mutually agreed. In case of disagreement to a rate which, in the opinion of employer, is reasonable.

30. The employer in this case is the Superintending Engineer, who had recommended Rs. 90/- per Cubic Metre saying it was reasonable rate. The Government had approved the rate and directed payment to be made accordingly. Such a decision cannot be termed to be either arbitrary, illegal or irrational. In such like cases, which involve serious questions, both of law and of facts, the petitioner ought to have been relegated to the ordinary remedy of civil suit. The material on record is not sufficient to come to a conclusion as sought for by the petitioner. May be that the writ petitioner says that he has to lead no evidence, but the appellants' case is that on every point not only documentary but also oral evidence is absolutely necessary. Therefore, the learned single Judge was not justified in going ahead to entertain and decide a writ involving disputed questions. The order is liable to be set aside and the writ petition deserves to be dismissed with liberty reserved to the writ petitioner to avail of alternative remedy. Needless to add that what has been observed by the learned single Judge or by us in the course of the judgment will not come in the way of the appropriate Court taking its own decision on the merits of the case as per the evidence to be led before it. Learned Advocate General has frankly conceded and rightly so that the time spent by the writ petitioner in prosecuting the writ petition and time spent in disposal of this appeal will be liable to be excluded in computing the period of limitation for filing a suit by the writ petitioner.

31. Writ appeal is accordingly allowed with the observations made above. Judgment of learned single Judge, which is also reported as **Sri Rama**

Engineering Constructions (E&C) Hyd. v. Govt. of A.P, is set aside. Writ petition is dismissed. Parties left to bear their respective costs.

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31st March 2005.

LR Copy to be marked:

Sarfraz

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One fair copy to Hon'ble Sri Justice B.Seshasayana Reddy, High Court of A.P., (for His Lordship's kind perusal)

To

1 . Commissioner and Ex.Officio Secretary to Government, I&CAD Department, Secretariat Buildings, Hyderabad.

2 Chief Engineer (Projects), Neelam Sanjiva Reddy Sagar Project, 6th Floor, Gagan Vihar, Opp:Gandhi Bhavan, MJ Road, Hyderabad.

3 Superintending Engineer SRBC, Circle NO.3
Nandyal, Kurnool Dist.

4 Executive Engineer SRBC Division 3-4, Koilkuntla Kurnool Dist

5. The Under Secretary, Ministry of Law, Justice and Company Affairs, New Delhi.

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